84-308 (1)

No. 84-

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1984

S. WILLIAM GREEN, EVELYN GREEN and CYNTHIA COLIN, as Executors of the Estate of Louis A. Green, deceased, and EVELYN GREEN, individually, and as stockholders of Kirby Lumber Corporation, suing on behalf of themselves and for the benefit of said corporation and for the class of all other stockholders of said corporation similarly situated,

Petitioners,

v.

SANTA FE INDUSTRIES, INC., SANTA FE NATURAL RESOURCES, INC., KIRBY LUMBER CORPORATION.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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59PP

QUESTIONS PRESENTED

1. Where the highest court of Delaware, in Weinberger v. UOP, Inc., 457 A.2d 701 (Del. Supr. 1983), plainly "preserved" plaintiffs' "right to challenge the element of fair value" in equity in "any case challenging a cash-out merger, the effective date of which is on or before February 1, 1983," did not the Court of Appeals, in its summary affirmance of the District Court's grant of summary judgment, radically depart from Erie v. Tompkins, in constructing a limitation that said grandfather clause applied only to cases instituted after the 1977 decision in Singer v. Magnavox, 380 A.2d 969 (Del. Supr. 1977) contrary to Weinberger's unambiguous holding, thus nullifying the state created remedy.

2. Did not the federal courts below flagrantly deviate from Erie v. Tompkins by granting summary judgment dismissing plaintiffs' claim under New York law, (Martin Act, Gen. Bus. L. Section 352-c) on the sole "basis" of the Delaware decision in Weinberger, contrary to the substantive law of New York, whereby New York state courts interpret their own Martin Act without regard to Delaware decisions.

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IN THE SUPREME COURT
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S. WILLIAM GREEN, EVELYN GREEN and CYNTHIA COLIN, as Executors of the Estate of Louis A. Green, deceased, and EVELYN GREEN, individually, and as stockholders of Kirby Lumber Corporation, suing on behalf of themselves and for the benefit of said corporation and for the class of all other stockholders of said corporation similarly situated,

Petitioners,

v.

SANTA FE INDUSTRIES, INC., SANTA FE NATURAL RESOURCES, INC., KIRBY LUMBER CORPORATION,

et Respondents.

PETITION OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The Order of the Court of Appeals, is unreported (A 1).* The order of the Court of Appeals, denying the petition for rehearing, is reported at _____ F.2d _____ (A 19). The Opinion of the District Court is reported at 576 F. Supp. 269 (S.D.N.Y. 1983) (A 4).

JURISDICTION

The Judgment of the Court of Appeals was entered on April 13, 1984. A timely petition for rehearing was denied May 25, 1984, and this petition for a Writ of Certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Note: Emphasis supplied unless otherwise noted.

* Citations are to the Appendix contained herein, designated by "A" and page number.

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STATUTE INVOLVED

Involved herein is the New York Martin Act, N.Y. Gen. Bus. L. Sec. 352-c (McKinney 1984), set forth in the Appendix hereto.

STATEMENT OF THE CASE

This action growing out of a short form merger, was commenced on behalf of defendant Kirby Lumber Corporation, a Delaware corporation ("Kirby"),* and as a class action on behalf of its minority stockholders. The original complaint filed in September 1974 alleged violations of Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. Section 78aa), Rule 10b-5 of the Securities and Exchange Commission

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*The derivative claim has been dropped.

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("SEC") and a Delaware state claim for breach of fiduciary obligation because the fiduciary forced its minority out at an unconscionable price. By amendment, violation of the New York Martin Act was also alleged.

The underlying facts are not in dispute. Prior to the transaction involved here, Santa Fe Natural Resources, Inc., which is a wholly owned subsidiary of Santa Fe Industries, Inc. ("Santa Fe"), owned 95% of Kirby and 5% was held by public minority shareholders, including the plaintiffs. For the sole purpose of getting rid of the minority interest in Kirby, defendants created Forest Products, Inc. ("FPI"), a Delaware corporation, on July 11, 1974, to effect a statutory merger under the color of the Delaware short former merger statute which authorized effectuation of the

merger before notice to and without consent of the minority, and provision for payment in cash as unilaterally fixed by the fiduciary for the minority shares.

On July 31, 1974, defendants caused FPI to be merged into Kirby, cashing out the minority. By letter of August 1, 1974, after the merger had been completed, effective the previous day, the minority stockholders of Kirby were first informed by defendants that their only right was to receive a cash payment of $150 per share or to seek an appraisal under Delaware law for the fair value of those shares.

Prior to the freeze-out merger on July 31, 1974, the following significant facts took place:

(i) Appraisal Associates on February 19, 1974, had submitted to the

defendants a written appraisal of the land (exclusive of minerals), timber, buildings and machinery belonging to Kirby as of December 31, 1973, stating its market value to be $320,000,000. The book value of these assets was only $9,000,000. The difference of $311,000,000 was $622 per share over and above the book value of those assets of Kirby.

(ii) By letter of June 24, 1974 Morgan Stanley & Co., with knowledge of that written appraisal, rendered an opinion that the fair market value of the Kirby stock was $125 per share.

(iii) Certain minority stockholders of Kirby, not including plaintiffs herein, sued under Delaware's appraisal statute. The court of last resort in Delaware affirmed an award to the

appraisal participants of $254.40 per share plus $99.57 prejudgment interest - a total of $353.97 per share. Bell v. Kirby Lumber Corp., 413 A.2d 137 (Del. Supr. 1980). At the appraisal trial, Kirby's expert, Nichols, valued Kirby's assets at $227,754,000 and after certain adjustments made by the Court appointed appraiser, the Supreme Court of Delaware affirmed the adoption of that asset valuation which amounted to $456 per share;* it also found a value of $120 per share under an earnings approach and assigned a weight of 60% to earnings and 40% to asset value in arriving at an appraised value of $254.40 per share.

*Certain other public stockholders of Kirby have recently moved for summary judgment in a New York State action on the ground that defendants are collaterally estopped on the issue of fair value of assets showing a value of $456 per share.

The above transaction, whereby a fiduciary blatantly overreached its cestuis, in a short form cash-out merger constituted a plain breach of fiduciary duty under Weinberger v. UOP Inc., 457 A.2d 701 (Del. Supr. 1983). Likewise, because of the acts committed in New York, it was a violation of New York's Martin Act (Gen. Bus. L. Section 352-c).

Prior Proceedings

This Court dismissed the federal claim because the fraud alleged was not manipulation or deception within the meaning of Section 10(b). Santa Fe Industries Inc. v. Green, 430 U.S. 462 (1977).

This court stated that "it is entirely appropriate in this instance to relegate respondent

(petitioners herein) and others in his situation to whatever remedy is created by state law." 430 U.S. 462, 478 (1977).

Plaintiffs were granted leave to file a second amended complaint limited to state claims grounded upon diversity jurisdiction in light of the Delaware Supreme Court's decision in Singer v. Magnavox Co., 380 A.2d 969 (Del. Supr. 1977), reaffirming the Mayflower doctrine (93 A.2d 107, Del. Ch. 1952) that a stockholder may sue for breach of fiduciary obligation and seek injunctive or monetary relief in equity under Delaware law in the case of a long form cash-out merger, despite the availability of a statutory appraisal.

In August 1979, the Delaware Supreme Court decided Roland International Corp. v. Najjar, 407 A.2d 1032. Roland applied

Singer to a short form freeze-out merger.

The District Court denied defendants' first motion for summary judgment on the basis of Roland. Green v. Santa Fe Industries, Inc., 88 F.R.D. 575, 576 (S.D.N.Y. 1980).

The U.S. District Court in November, 1983 granted defendants' motion for summary judgment dismissing the complaint on the purported basis but, actually, in complete disregard, of the recent decision by the Delaware Supreme Court in Weinberger v. UOP, Inc., 457 A.2d 701 (Del. Supr. 1983). The District Court failed to carry out this Court's mandate, above, by denying plaintiffs the remedy explicitly granted to them under Delaware law. Weinberger, discussed infra. The Court of Appeals for the Second Circuit

summarily affirmed, in an unreported opinion, on April 13, 1984. Rehearing was denied May 25, 1984.

Also, the District Court in this case twice denied a motion for class certification under Fed. R. Civ. P. 23 and denied a motion to intervene under Fed. R. Civ. P. 24. As a result, certain other shareholders of Kirby started their own action in Federal Court, Loengard v. Santa Fe.

Jurisdiction of the Federal District Court

The basis for federal jurisdiction in the District Court is 28 U.S.C. Section 1332(a)(1): diversity of citizenship.

ARGUMENT

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Second Circuit, in summarily affirming the District Court's grant of summary judgment dismissing the complaint, has so far sanctioned a departure from the accepted and usual course of judicial proceeding, as to call for an exercise of this Court's power of supervision. U.S. Sup. Ct. Rule 17, 28 U.S.C.*

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* Reference is made to the District Court hereafter since the Court of Appeals summarily affirmed the District Court's decision.

THE FEDERAL DISTRICT COURT'S MODIFICATION AND LIMITATION OF A RECENT UNAMBIGUOUS HOLDING OF THE HIGHEST COURT OF DELAWARE IS A USURPTION OF STATE POWER, CONTRA ERIE V. TOMPKINS

There is no question that Erie v. Tompkins, 304 U.S. 64 (1938) and its progeny require that the Federal District Court apply the applicable state law, namely Delaware. It is also undisputed that the recent decision by the highest court in Delaware, Weinberger v. UOP, Inc., 457 A.2d 701 (Del. Supr. 1983), controls this claim. See, Vandenbank v. Owens Illinois Co., 311 U.S. 538, 543 (1941).

However, under the guise of interpreting Weinberger, the District Court, "created" new law, in direct contradiction to the unequivocal rule

announced in Weinberger. Such a departure from the controlling state law, is a usurption of the state's power, contrary to Erie.

On February 1, 1983, the Delaware Supreme Court in Weinberger, supra, restated the law in Delaware that the majority stockholder breaches his fiduciary obligation by cashing out the minority at an unfair price. 457 A.2d at 711, 712, 715.

The Delaware Supreme Court was determined to give appropriate relief in all cases where a freeze-out had been at an unfair price, i.e., had involved a breach of fiduciary obligation. Id. The Court laid down two methods for effecting the equitable result of giving the frozen out stockholders a fair price for their stock.

The first method* was an expanded appraisal remedy under Delaware's appraisal statute, 8 Del. C. § 262. The Court adopted a

> "more liberal, less rigid and stylized, approach to the valuation process than has heretofore been permitted." 457 A.2d at 704.

However, the Delaware Supreme Court refused to apply the appraisal remedy retroactively, recognizing that litigants, including the Weinberger plaintiff, were time barred from seeking appraisal under the appraisal statute, 8 Del. C. §262. Weinberger, 457 A.2d at 704, 714. Thus, the Court set forth an explicit grandfather clause for five categories of cases, where the stockholder's remedy would not be

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* The second method, a continued equity action is discussed infra, page 21.

confined to the statutory appraisal remedy, 457 A.2d at 714-715:

> Obviously, there are other litigants, like the plaintiff, who abjured an appraisal and whose rights to challenge the element of fair value must be preserved. Accordingly, the quasi-appraisal remedy we grant the plaintiff here will apply only to: (1) this case; (2) any case now pending on appeal to this Court; (3) any case now pending in the Court of Chancery which has not yet been appealed but which may be eligible for direct appeal to this Court; (4) any case challenging a cash-out merger, the effective date of which is on or before February 1, 1983; and (5) any proposed merger to be presented at a shareholder's meeting, the notification of which is mailed to the stockholders on or before February 23, 1983.
>
> Thereafter, the provisions of 8 Del. C. Section 262, as herein construed, respecting the scope of an appraisal and the means for perfecting the same, shall govern the financial remedy available to minority shareholders in a cash-out merger.

Since the Kirby cash-out merger occurred in 1974, our case falls squarely within category four (4): cash-out mergers

effected on or before February 1, 1983. We also fit squarely within category (3).*

The District Court refused to apply the explicit grandfather clause on grounds that are clearly untenable. The District Court stated that the grandfather clause should be applied only to cases instituted after the Singer v. Magnavox decision, 380 A.2d 969 (Del. Supr. 1977) (A 12-13, A 17). There is absolutely no warrant in Weinberger for this interpretation of the grandfather clause. Weinberger suggests no such cut off date. Weinberger plainly preserves:

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* It has long been established law under the supremacy clause that where a general remedy is made available in the state courts, federal courts cannot be excluded from administering the same in their diversity jurisdiction. Ry. Co. v. Whitton's Administrator, 13 Wall (80 U.S.) 270 (1871); Markham v. City of Newport News, 292 F.2d 711 (4th Cir. 1961); 17 Wright & Miller, Federal Practice and Procedure, §4211 "State Attempts to Limit Federal Jurisdiction."

"any case challenging a cash out merger, the effective date of which is on or before February 1, 1983". 457 A.2d at 714-715. Had the Delaware Supreme Court intended to limit the savings clauses to actions instituted after the Singer decision it would have said so; it said nothing of the kind. That Court was not inarticulate; the Weinberger opinion very carefully delineated the types of cases where the equity action would continue, and ours clearly falls within them. Moreover, such an exclusion from the grandfather clause does violence to the policy of the Weinberger decision.

It is basic to the Weinberger plan that no one be defeated because the Delaware Supreme Court there was modifying the procedure for granting an adequate remedy to the frozen-out

stockholders. Petitioners herein are "[o]bviously . . . other litigants, like the [Weinberger] plaintiff, who abjured an appraisal and whose rights to challenge the element of fair value must be preserved." 457 A.2d at 714.

The District Court also determined that the plaintiffs did not abjure an appraisal within the language of Weinberger and thus, did not apply the explicit grandfather clause.

That is contrary to this Court's determination in its prior decision, that "Respondents [petitioners herein], minority stockholders of Kirby, objected to the terms of the merger, but did not pursue their appraisal remedy in the Delaware Court of Chancery." (430 U.S. at 466-467).

Defendants agree that "plaintiffs . . . (the 'Green plaintiffs') decided not to seek appraisal . . ." (Defendant's Brief dated August 16, 1984, p. 2, filed in Supreme Court of the State of New York). Petitioners plainly "abjured" an appraisal. That is, they rejected the appraisal remedy as not giving adequate relief. They sent a letter asking for appraisal but expressly reserved the right to withdraw the request; they did withdraw the request; defendants accepted the said withdrawal; they were not included in the appraisal proceeding; they did not receive any proceeds of the appraisal proceeding. Plainly, therefore, plaintiffs' "rights to challenge the element of fair value must be preserved". 457 A.2d at 714.

It is illogical that the federal court denied plaintiffs any relief, under Weinberger. The result of the decisions below is that plaintiffs are being disadvantaged because they were ingenious enough to reject the appraisal remedy, since they recognized, as did the Delaware Supreme Court, that the prior appraisal method of valuation is "clearly outmoded." Weinberger, 457 A.2d at 712.

The Delaware Supreme Court in Weinberger, laid down a second method by stockholders would receive appropriate relief: a continued equity action for rescission. This remedy would continue to be available where the expanded appraisal was not an adequate remedy. In the ordinary case, the expanded appraisal would give full relief making the general equity action unnecessary.

This holding was completely ignored by the District Court. Appraisal is not the sole remedy allowed by Weinberger for a breach of fiduciary obligation through a short form cash-out merger. The Supreme Court of Delaware expressly held as follows, 457 A.2d, at 714:

> While plaintiff's monetary remedy ordinarily should be confined to the more liberalized appraisal proceeding herein established, we do not intend any limitation on the historic powers of the Chancellor to grant such other relief as the facts of a particular case may dictate. The appraisal remedy we approve may not be adequate in certain cases, particularly where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross and palpable over-reaching are involved. Cole v. National Cash Credit Association, Del. Ch., 156 A. 183, 187 (1931). Under such circumstances, the Chancellor's powers are complete to fashion any form of equitable and monetary relief as may be appropriate, including rescissory damages. Since it is apparent that this long completed transaction is too involved to undo, and in view of the Chancellor's discretion, the

> award, if any, should be in the form of monetary damages based upon entire fairness standards, i.e., fair dealing and fair price.

This holding, applies squarely to our case. The complaint, filed September 10, 1974, alleged a self-deal: the majority stockholder fixed the price at which it bought out the minority; that price was so disproportionate to the fair value - $150 per share paid for stock worth at least $772 per share - as to evidence fraud or gross and palpable overreaching; the complaint asked alternatively for rescission or reformation of the merger.

Weinberger holds that such a suit would not be precluded even with respect to new mergers and new cases. In any event, it is clear that even if only money damages are now available, our case, pending when Weinberger was decided

and involving a pre-1983 merger, was the very kind of suit Weinberger intended to preserve because it is now too late for plaintiffs to get the advantage of the newly liberalized statutory appraisal.

In an illogical, arbitrary manner, the federal district court carved out an exception to the unambiguous savings clause, denying plaintiffs their state-created remedy. The District Court stated that "plaintiffs would reap a windfall" if the Court applied the grandfather clause in Weinberger (A 13). If the decision below is affirmed, the only party to reap a windfall is the faithless fiduciary defendants. Plaintiffs have never had an opportunity for a "fairness" hearing.

Such gross injustice should not be attributed to the Delaware Supreme Court.

This case clearly would have produced an opposite result in the Delaware courts.* See Guarranty Trust v. York, 326 U.S. 99, 109 (1945).

THE DISTRICT COURT COMMITTED GRAVE ERROR OF LAW IN DENYING PLAINTIFFS' CLAIM UNDER NEW YORK'S MARTIN ACT SOLELY ON THE BASIS OF WEINBERGER, A DELAWARE DECISION WHICH CLEARLY DOES NOT AND COULD NOT BAR A CLAIM UNDER NEW YORK LAW CONTRA ERIE

The District Court denied plaintiffs' New York Martin Act claim, (Gen. Bus. L. Section 352-c) on the "basis" of Weinberger, supra. (A 6-7). This is a patent error of law since the New York State courts would not look to the law of Delaware to decide violations

* One of the twin aims of Erie is the "avoidance of inequitable administration of the laws". Hanna v. Plumer, 380 U.S. 460, 468 (1965).

of New York's Martin Act. Erie, supra. No other reason was given for the grant of summary judgment on the Martin Act claim.

The courts below, under the guise of applying state law, have completely disregarded the Delaware Supreme Court's most recent applicable decision and New York's applicable statute. This extreme departure from the accepted and usual course of judicial proceeding, calls for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: August 23, 1984

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the 13th Day of April, one thousand nine hundred and eighty-four.

P R E S E N T :

HONORABLE WILLIAM H. TIMBERS

HONORABLE GEORGE C. PRATT,

Circuit Judges,

HONORABLE CHARLES M. METZNER,

District Judge, of the Southern District of New York, sitting by designation.

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GREEN et al.

Plaintiffs-Appellants,

v. No. 83-9072

SANTA FE INDUSTRIES, INC., et al.,

Defendants-Appellees.

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Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of the District Court is affirmed, substantially for the reasons set forth by Judge Duffy below in his memorandum and order, dated November 22, 1983, which dismissed plaintiffs' complaint.

WILLIAM H. TIMBERS, U.S.C.J.

GEORGE C. PRATT, U.S.C.J.

CHARLES M. METZNER, U.S.D.J.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall

not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S. WILLIAM GREEN, et al.,

Plaintiffs,

-against-

SANTA FE INDUSTRIES, INC., et al.,

Defendants.

MEMORANDUM & ORDER

74 Civ. 3915 (KTD)

(Dated: November 22, 1983)

KEVIN THOMAS DUFFY, D.J.:

This case arises out of a Delaware short-form merger between defendant's wholly-owned subsidiary, formed for the purpose of the merger, and Kirby Lumber Corp. ("Kirby") and the objections voiced by the minority shareholders of Kirby to the merger. The factual background and procedural history of this case are set forth fully in Santa Fe Industries, Inc., et al. v. Green, 430 U.S. 462 (1977); Bell v. Kirby Lumber Corp., 413 A.D.2d 137 (Del. 1980); Green v. Santa Fe

Industries, Inc., 88 F.R.D. 575 (S.D.N.Y. 1980), and will not be reiterated herein. Defendants move for summary judgment pursuant to Fed. R. Civ. P. 56.

In their second amended complaint, the plaintiffs assert two causes of action. The first claim for fraud alleges violation of New York's Martin Act, N.Y. Gen. Bus. Law §§ 339-2, 352-c (McKinney's Supp. 1981-1982), and Delaware's common law. The second cause of action is for breach of a fiduciary obligation. Plaintiffs allege that as part of a fraudulent scheme to lull the minority shareholders of Kirby into believing that an independent appraisal was necessary, defendant Morgan Stanley & Co. ("Morgan Stanley") undervalued the price of the stock at $125.00 per share when it was worth at least $772.00 per share. In ad-

dition, plaintiffs contend that the information statement sent to them in 1974 contained several material omissions in violation of the Martin Act. See Second Amended Complaint at 4-6. In the second cause of action for breach of fiduciary duty, plaintiffs allege that the defendants, as fiduciaries, owed plaintiffs a duty to be fair and honest and to act in good faith. They assert that this duty was breached because the merger had no business purpose and the stock was undervalued by Morgan Stanley. Defendants made an earlier motion for summary judgment which I denied on the basis of the then current Delaware Law. Green v. Santa Fe Industries, 88 F.R.D. 575, 576 (S.D.N.Y. 1980).

Defendants now move for summary judgment

on both causes of action on the basis of the recent holding in Weinberger v. UOP, Inc. Defendants argue that Weinberger is binding on all cases sub judice and, therefore, acts as a bar to the plaintiffs' action. For the following reasons, summary judgment is granted in the defendants' favor. Accordingly, it is unnecessary to address the arguments asserted under the Martin Act.

DISCUSSION

The party moving for summary judgment must establish that there is no disputed material fact, and that it is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56; see Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). In determining whether an issue remains to be tried, all facts and inferences

must be viewed in a light most favorable to the party opposing the motion for summary judgment. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

In a diversity case, the federal court must apply the substantive law that the state would apply. Erie v. Tompkins, 304 U.S. 64 (1938). While a case is sub judice, the most recent controlling decisions of the state should be applied. Vandenbank v. Owens-Illinois Co., 311 U.S. 538, 543 (1941). Therefore, I will review briefly the progression of Delaware case law on this issue.

Section 253 of the Delaware Corporation Law permits a parent corporation owning 90% or more of the stock of a subsidiary to merge with the subsidiary and make cash payments to the minority shareholders. Those shareholders

dissatisfied with the offered price must make a written demand for appraisal in the Delaware Court of Chancery within 120 days of the effective date of the merger. See Del. Code Ann. Title 8, 3262 (Supp. 1982). In 1974, at the time this action was commenced, the law in Delaware was that appraisal was an exclusive remedy.

In Stauffer v. Standard Brands, Inc., 187 A.2d 78, 80 (1962), the court dismissed an action for fraud and stated that "the very purpose of the statute is to provide the parent corporation with a means of eliminating the minority shareholder's interest in the enterprise." More than five years after the commencement of Green, the Delaware Supreme Court overruled Stauffer and held that a valid "corporate purpose" was required for a short-

form merger, and that appraisal rights were not an exclusive remedy. Roland International Corp. v. Najjar, 407 A.2d 1032, 1036 (Del. 1979) (extending the holding in Singer v. Magnavox Co., 380 A.2d 969 (Del. 1977), which had allowed other remedies to shareholders involved in an ordinary merger). In Roland, the court held that a merger effected for no other purpose than to eliminate public shareholders may give rise to causes of action other than for appraisal, including a breach of fiduciary duty claim. Id. Defendants' prior summary judgment motion was denied on the basis of Roland.

Recently, however, in Weinberger v. UOP, Inc., the Delaware Supreme Court returned to the Stauffer rule and held that no corporate purpose is required under Delaware's short-form merger statute, and that minority shareholders are

limited to an appraisal remedy. 457 A.2d 701, 715 (Del. 1983). Although Weinberger disallowed minority shareholders any relief outside that provided by the Delaware short-form merger statute, it also explicitly limited the retroactive effect of the decision. The Weinberger court stated:

> Obviously, there are other litigants, like the plaintiff, who abjured an appraisal and whose rights to challenge the element of fair value must be preserved. Accordingly, the quasi-appraisal remedy here will apply only to: ...(4) any case challenging a cash-out merger, the effective date of which is on or before February 1, 1983.

457 A.2d at 714. Thus, the court permitted the minority shareholders in Weinberger, and plaintiffs in other cases similarly situated, to seek relief other than appraisal, but held that in the future appraisal rights

would be an exclusive remedy. Id. at 715.

Defendants argue that the Weinberger court, in limiting its holding retroactively, intended to assist those plaintiffs who brought an action between Singer, decided in 1977, and Weinberger. Thus, defendants contend that the Green plaintiffs have no excuse for not pursuing an appraisal remedy because their action was instituted at a time when Singer had not yet been decided, and therefore plaintiffs could not possibly have relied on Singer. Defendants' argument is persuasive. Although the Weinberger court, appeared to limit the reach of its holding to all mergers effected before 1983, the policy considerations behind the court's decision to allow certain plaintiffs to continue to seek remedies other than appraisal would

not be promoted by a blind application of the court's provision for retroactive relief. Further, plaintiffs would reap a windfall that the Delaware Supreme Court could not have intended.

In Weinberger, the court held that it was "return[ing] to the well established principles of Stauffer v. Standard Brands, Inc., 187 A.2d 78 (Del. 1962) and Greene & Co. v. Schenley Industries, Inc., 281 A.2d 30 (Del. Ch. 1971), mandating a stockholder's recourse to the basic remedy of appraisal." The claim in Stauffer was that the cash offered to the minority shareholders was so inadequate that it constituted constructive fraud. 187 A.2d at 80. The Stauffer court reasoned that although an "ever-present power of equity to deal with illegality or fraud" is vested in

the court, where the dispute is over the value of the stock, "there is no remedy except appraisal." Id.

In Greene, which was an action for an order enjoining the proposed merger between the parent and subsidiary, the court held:

> [U]nless the fair value of Schenley stock is so much greater than the total amount offered, or that plaintiffs and other minority stockholders are being otherwise deprived of clear rights or otherwise so taken advantage of by those charged with a fiduciary duty towards them as to constitute a form of constructive fraud, or the like, then it would appear that the parties are merely in dispute as to value, for which an appraisal should be adequate.

281 A.2d at 33. This is the situation here. Plaintiffs are complaining that the stock was undervalued by Morgan Stanley.[1/]

The reasoning employed in Greene and Stauffer are applicable in this case. In addition, for the reasons that follow the Weinberger court's holding on the retroactive application of its decision will not be utilized under the facts and circumstances of this case.

First, at the time that the plaintiffs instituted their action in 1974, appraisal was the only remedy available to dissatisfied minority shareholders of a merged corporation after a short-form merger was perfected. See Stauffer v. Standard Brands, Inc., 187 A.2d 78 (Del. 1962). On August 21,1974, the plaintiffs filed a petition in the Delaware Court of Chancery for appraisal but withdrew that petition. The day after the withdrawal, the plaintiffs com-

menced an action in federal court alleging violations of the federal securities laws. See Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 467 n.4 (1976). Thus, plaintiffs -- to use the language of the Weinberger court-- did not "abjure an appraisal." They sought appraisal and made a conscious tactical decision to withdraw their petition. Their "rights to challenge the element of fair value" did not have to be preserved because they had the opportunity to and did, in fact, seek appraisal.

Second, the Delaware Supreme Court in Weinberger, provided for prospective application of its holding on appraisal exclusivity because litigants who instituted actions after Singer was decided could be said to have relied on Singer in waiving their right to an

appraisal. Here, plaintiffs could not be said to have relied on Singer. Their action was commenced in 1974 when appraisal was the exclusive remedy and three years before Singer was decided. Thus, the Green plaintiffs did not rely on Singer when they withdrew their petition for appraisal.

Accordingly, summary judgment is granted in favor of the defendants.

SO ORDERED.

DATED: New York, New York
November 22, 1983

KEVIN THOMAS DUFFY, U.S.D.J

FOOTNOTE

1. Bell V. Kirby Lumber Corp., 413 A.2d 137 (Del. 1980), involved the Kirby shareholders who invoked the appraisal remedy. The court held that the "Morgan Stanley appraisal is the product of an orderly and logical deductive process in accordance with the approved methodology properly accepted by the Appraiser and the Vice-Chancellor." Id. at 147 (citations omitted). In addition, the Delaware Supreme Court did not suggest that any fraud of overreaching occurred in connection with the 1974 short-form merger. Thus, even if Stauffer were inapplicable here, it is unlikely that the facts would support an allegation of constructive fraud based on a breach of a fiduciary duty.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 25th day of May one thousand nine hundred and eighty-four.

----------x

GREEN et al.,
Plaintiffs-Appellants,

v. No. 83-9072

SANTA FE INDUSTRIES, INC., et al.,
Defendants-Appellees.

----------x

A petition for rehearing containing a suggestion that the action be reheard in banc having filed herein by counsel for the plaintiffs-appellants, S. William Green, et al.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

New York's Martin Act, N.Y. Gen. Bus. Law §352-c. Prohibited acts constituting misdemeanor; felony

1. It shall be illegal and prohibited for any person, partnership, corporation, company, trust or association, or any agent or employee thereof, to use or employ any of the following acts or practices:

(a) Any fraud, deception, concealment, suppression, false pretense or fictitious or pretended purchase or sale;

(b) Any promise or representation as to the future which is beyond reasonable expectation or unwarranted by existing circumstances;

(c) Any representation or statement which is false, where the person who made

such representation or statement: (i) knew the truth; or (ii) with reasonable effort could have known the truth; or (iii) made no reasonable effort to ascertain the truth; or (iv) did not have knowledge concerning the representation or statement made; where engaged in to induce or promote the issuance, distribution, exchange, sale, negotiation or purchase within or from this state of any securities or commodities, as defined in section three hundred fifty-two of this article, regardless of whether issuance, distribution, exchange, sale, negotiations or purchase resulted.

2. It shall be illegal and prohibited for any person, partnership, corporation, company, trust or association, or any agent or employee thereof, engaged in any artifice,

agreement, device or scheme to obtain money, profit or property by any of the means prohibited by this section.

3. It shall be illegal and prohibited for any person, partnership, corporation, company, trust or association, or any agent or employee thereof, engaged in the sale of any securities or commodities, as defined in section three hundred fifty-two of this article, within or from the state of New York to represent that they are an "exchange" or use the word "exchange", or any abbreviation or derivative thereof, in its name or assumed name unless it is registered with the Securities and Exchange Commission as a national securities exchange, pursuant to section six of the Securities and Exchange Act of

1934, or unless it has been designated as a contract market by the Commodity Futures Trading Commission pursuant to section five of the Commodity Exchange Act.

No. 84-303

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

S. WILLIAM GREEN, EVELYN GREEN and CYNTHIA COLIN, as the Executors of the Estate of LOUIS A. GREEN, Deceased, and EVELYN GREEN, Individually, and as Stockholders of Kirby Lumber Corporation, Suing on Behalf of Themselves and for the Benefit of Said Corporation and for the Class of All Other Stockholders of Said Corporation Similarly Situated,

Petitioners,

—v.—

SANTA FE INDUSTRIES, INC., SANTA FE NATURAL RESOURCES, INC., KIRBY LUMBER CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

S. WILLIAM GREEN, EVELYN GREEN and CYNTHIA COLIN, as the Executors of the Estate of LOUIS A. GREEN, Deceased, and EVELYN GREEN, Individually, and as Stockholders of Kirby Lumber Corporation, Suing on Behalf of Themselves and for the Benefit of Said Corporation and for the Class of All Other Stockholders of Said Corporation Similarly Situated,

Petitioners,

—v.—

SANTA FE INDUSTRIES, INC., SANTA FE NATURAL RESOURCES, INC., KIRBY LUMBER CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Santa Fe Industries, Inc., Santa Fe Natural Resources, Inc., and Kirby Forest Industries, Inc., formerly known and designated herein as Kirby Lumber Corporation*, respectfully request that this Court deny

* Pursuant to Rule 28.1 of the Rules of this Court, respondents state that the ultimate parent of each of them is Santa Fe Southern Pacific Corporation. Respondents have no subsidiaries which are publicly traded.

the petition for writ of certiorari seeking review of the Second Circuit's decision in this case. Respondents further request, in view of the frivolous nature of the petition, that appropriate damages be awarded pursuant to Rule 49.2 of the Rules of this Court.

QUESTIONS PRESENTED

1. Where the substance of the petitioners' contention is only that the courts below incorrectly interpreted state law, is any genuine question presented under *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938)?

2. Where the Delaware Supreme Court, in overruling an earlier decision, provided a limited exception to the retroactivity of its ruling, in favor of plaintiffs who had relied on the earlier decision, and the claim of petitioners herein arose prior to the earlier decision, so that they could not have relied thereon, did the courts below correctly hold that petitioners were not within this exception to retroactivity?

3. Were the courts below correct in summarily dismissing petitioners' claims under a New York State statute where the New York courts had previously rejected petitioners' interpretation of that statute?

STATEMENT OF THE CASE

The 1974 transaction which gave rise to the present action is fully described in this Court's decision in *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977). Briefly, petitioners in 1974 were stockholders of Kirby Lumber Corporation ("Kirby"), a Delaware corporation, 95% of

the stock of which was owned by respondent Santa Fe Natural Resources, Inc. ("Resources"). Resources in turn was a wholly owned subsidiary of respondent Santa Fe Industries, Inc. ("Santa Fe"). Section 253 of the Delaware Corporation Law, commonly referred to as the "Short Form Merger Statute", provides an expedited procedure through which a parent corporation owning 90% or more of the stock of a subsidiary can eliminate the minority interest and tender cash payments to the former minority stockholders. Stockholders dissatisfied with the amount of the cash payment offered may seek appraisal in the Court of Chancery under Section 262 of the Delaware Corporation Law.

On July 31, 1974, Resources effected a merger between Kirby and a subsidiary of Resources which had been formed for that purpose, the effect of which was to eliminate the minority stock interest in Kirby. The former minority stockholders were furnished with an information statement which described the transaction, and informed them that they could either accept a cash payment of $150 per share, or invoke their right of appraisal in the Delaware courts. Petitioners originally indicated their intention to seek appraisal, but subsequently withdrew their request, and instead commenced the present action in the United States District Court for the Southern District of New York. Although not alleging any misrepresentations or failures to disclose, petitioners in their original complaint sought to invoke Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, urging that these provisions were violated by the alleged unfairness of the merger terms, even in the absence of any manipulation or deception. This Court rejected petitioners' contention, and held that they had failed to state a claim under the federal securities laws.

After this Court upheld the dismissal of petitioners' purported federal securities claims, petitioners amended their pleadings to assert state law claims exclusively, invoking the jurisdiction of the District Court solely on the basis of diversity of citizenship. The Second Amended Complaint, the dismissal of which is here involved, contained two purported claims, one for alleged breach of fiduciary duty under Delaware common law, and one under New York General Business Law Section 352-c, commonly known as the Martin Act.

ARGUMENT

Reasons Why the Writ Should Be Denied

1. The Petition Asks this Court to Review a Narrow Factual Issue with No General Applicability

The issue which petitioners seek to raise in this Court is an extremely narrow question, relating to the application of state law to a complex and probably unique set of facts.

As this Court noted in its earlier decision in this action, 430 U.S. at 479 n.16, prior to 1977 the law of Delaware was clear that the sole remedy for a dissatisfied stockholder in a Delaware short form merger was a statutory appraisal proceeding under Section 262 of the Delaware Corporation Law. In 1977, in *Singer* v. *Magnavox Co.*, 380 A.2d 969 (Del. Sup. 1977), the Delaware Supreme Court overruled its earlier decisions on this point, and held that under some circumstances an action for breach of fiduciary duty could be brought in lieu of appraisal. In 1983, in *Weinberger* v. *UOP, Inc.*, 457 A.2d 701 (Del. Sup. 1983), the Delaware Supreme Court again reversed its position, and overruled *Singer*, holding that the statu-

tory appraisal was once again the exclusive remedy of a dissatisfied stockholder.

In so doing, the Court in *Weinberger* noted that "there are other litigants, like the plaintiff, who abjured an appraisal and whose rights to challenge the element of fair value must be preserved" (457 A.2d at 714). The opinion in *Weinberger* clearly indicated that the rule there announced is not retroactive as to persons who, like the plaintiff in that case,[1] had relied on the *Singer* decision in deciding to forego appraisal. The only point of dispute in the present case was whether the exemption from retroactive effect should also apply to plaintiffs, who were in the virtually unique position of still litigating a pre-1977 merger at the time the *Weinberger* decision was announced.

The record reveals that no such cases exist, other than the present action, a duplicative action brought by petitioners in the New York state court,[2] and one case pending in the Delaware Court of Chancery, which apparently was abandoned several years ago. Thus, the resolution of the issues which petitioners seek to raise would have no application beyond their own case. Under these circumstances, petitioners can hardly assert in good faith that the present case presents "special and important reasons" for review, as required by Rule 17 of the Rules of this Court.

---

1 Weinberger had filed a complaint which closely tracked the complaint in *Singer*. *See Weinberger* v. *UOP, Inc.*, 426 A.2d 1333, 1342 (Del. Ch. 1981), *rev'd*, 457 A.2d 701 (Del. Sup. 1983).

2 Petitioners' state court action is currently the subject of a motion for summary judgment, on the basis *inter alia* of *res judicata* and collateral estoppel.

2. The Purported Issues as to Which Petitioners Seek Review Were Never Raised in the Courts Below, and Do Not Present Any Genuine Federal Question

In 1983, respondents moved in the District Court for summary judgment, asserting that the decision of the Delaware Supreme Court in *Weinberger* v. *UOP, Inc.*, 457 A.2d 701 (1983) mandated the dismissal of the petitioners' claim under Delaware law. At the same time, respondents also sought summary judgment dismissing the claim under the New York Martin Act. Both sides agreed that the *Weinberger* decision was the applicable Delaware authority, but disagreed sharply as to how it should be interpreted. The District Court, after a careful analysis of the *Weinberger* decision and other Delaware cases, concluded that if faced with this case the Delaware Supreme Court would now dismiss petitioners' claim, and that otherwise petitioners "would reap a windfall that the Delaware Supreme Court could not have intended" (A 13, 576 F. Supp. at 271). At the same time the District Court stated that it was unnecessary to discuss petitioners' claim under the Martin Act (A 7,576 F. Supp. at 270), which was clearly and completely precluded by the applicable New York State decisions under that statute (see pages 9-11, *infra*).

In the Second Circuit, petitioners argued that the decision of the District Court was incorrect under the applicable state law. They did *not* argue, or even remotely suggest, that the District Court had refused to follow state law, or had somehow acted in contravention of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). (A copy of the statement of issues from petitioners' brief in the Second Circuit is annexed to this brief as Appendix A.) The only issues which petitioners sought to raise in the Court of

Appeals related to the correctness of the District Court's interpretation of the applicable state law, and the correctness of that Court's earlier denial of class certification. The "Questions Presented" in the instant petition are sought to be raised for the first time in this Court, and that fact alone would warrant denial of the petition. *E.g*, *United States* v. *Santana*, 427 U.S. 38, 41 n.2 (1976); *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Even apart from the fact that it was never raised below, the contrived *Erie* "issue" is without substance. The entire basis of the lower courts' decision was their analysis of *Weinberger*, in an effort to ascertain the intention of the Delaware Supreme Court. Petitioners' contentions actually amount to no more than an argument that the courts below interpreted the state law incorrectly. Such a claim presents no issue meriting review by this Court.

3. The Result Reached by the Courts Below Was Clearly Correct on the Merits

A. *As to the Claim under Delaware Common Law*

As noted, the decisive issue in the lower courts as to the continued viability of petitioners' claim under Delaware law was whether the Delaware Supreme Court would apply *Weinberger* retroactively to persons who, like petitioners, obviously had not relied on the 1977 decision in *Singer*. After a careful review of the Delaware authorities, the District Court concluded that the Delaware Supreme Court, if it were deciding petitioners' case, would apply the *Weinberger* holding to them. Thus, the District Judge stated (576 F. Supp. at 271, A 12-13):

> Defendants argue that the *Weinberger* court, in limiting its holding retroactively, intended to assist

> those plaintiffs who brought an action between *Singer*, decided in 1977, and *Weinberger*. Thus, defendants contend that the *Green* plaintiffs have no excuse for not pursuing an appraisal remedy because their action was instituted at a time when *Singer* had not yet been decided, and therefore plaintiffs could not possibly have relied on *Singer*. Defendants' argument is persuasive. Although the *Weinberger* court appeared to limit the reach of its holding to all mergers effected before 1983, the policy considerations behind the court's decision to allow certain plaintiffs to continue to seek remedies other than appraisal would not be promoted by a blind application of the court's provision for retroactive relief. Further, plaintiffs would reap a windfall that the Delaware Supreme Court could not have intended.

A unanimous Court of Appeals summarily affirmed, "substantially for the reasons set forth by Judge Duffy below in his memorandum and order," (A 2), and rehearing was denied (A 19-20).

In attacking the correctness of this holding, petitioners urge in effect that the courts below should not have considered the policy considerations behind the state court's decision, but rather should have rigidly and literally applied the state court's reference to "any case challenging a cash-out merger, the effective date of which is on or before February, 1983" to petitioners. This contention, however, is without merit. In its task of "predicting a state court's position" (1A Moore's Federal Practice, 0.309[2] (2d Ed. 1983) at 3117), a federal court in a diversity case should seek to give effect to the policies set forth in the state courts' previous decisions. *E.g.*,

Stafford v. *International Harvester Co.*, 668 F.2d 142, 148 (2d Cir. 1981); *East Troy* v. *Soo Line R. Co.*, 653 F.2d 1123, 1129 (7th Cir. 1980), *cert. denied*, 450 U.S. 922 (1981); *Medvecz* v. *Choi*, 569 F.2d 1221, 1226 n.14 (3d Cir. 1977). Thus, a federal court in a diversity action should not automatically give literal application to a state courts' language in a case involving significantly different facts. *Ohio Casualty Insurance Co.* v. *Smit*, 297 F.2d 265, 267 (7th Cir. 1962). Further, this is the approach taken by the Delaware Supreme Court in applying the doctrine of *stare decisis* to its own previous decisions. *Bovay* v. *H.M. Byllesby & Co.*, 38 A.2d 808, 813 (Del. Sup. 1944) ("The language of the Court is to be interpreted in light of the situation presented.").

The courts below correctly interpreted and followed the policies behind the applicable state court decision, and petitioners have no valid basis for seeking review in this Court.

B. *As to the Purported Claim Under the Martin Act*

Petitioners complain (pp. 25-26) that the District Court summarily dismissed, without discussion, their state securities law claim under the Martin Act, New York General Business Law § 352-c. Petitioners omit to mention that their Martin Act claim is specifically and completely barred by the applicable New York authorities.

Petitioners did not, and could not, make any allegations of deception and reliance, which are essential elements of any private damage action under the Martin Act. Their complaint alleged that certain items were omitted from the information statement furnished to minority stockholders "for the purpose of lulling the

minority stockholders into not seeking appraisal or other judicial relief" (189 a, ¶ 15(c)). Petitioners, however, were obviously not "lulled", since they responded to the information statement by immediately "seeking appraisal or other judicial relief." This fact was fatal to petitioners' claim under the New York statute. As was held in *Halle & Stieglitz* v. *Kolen*, [1978-1981 Transfer Binder] Blue Sky L. Rep. (CCH) ¶ 71,435, at p. 68, 435 (Sup. Ct. N.Y. Co. 1978), *aff'd on the opinion below*, 71 A.D.2d 554, 418 N.Y.S.2d 552 (1st Dep't 1979):

> In order to state a cause of action for violation of section 352-c, a private plaintiff must allege the following elements: deception, materiality, reliance and proximate damage [*Drasner v. Thompson McKinnon Securities, Inc.*, 433 F. Supp. 485, 503 (SDNY 1977)].

Accord, *Shivers* v. *Amerco*, 670 F.2d 826, 832 (9th Cir. 1982) (applying New York law).

In the courts below, petitioners nevertheless urged that the alleged unfairness of the merger terms gave rise to a damage claim under the Martin Act even in the absence of deception and reliance, citing *People* v. *Concord Fabrics, Inc.*, 83 Misc. 2d 120 (Sup. Ct. N.Y. Co.), *affd.* 50 A.D.2d 787, 377 N.Y.S.2d 84 (1st Dep't 1975). However, the New York courts had already rejected a similar argument in *Halle & Stieglitz*, *supra* [1978-1981 Transfer Binder] Blue Sky L. Rep. (CCH) ¶ 71,435 at p. 68,436:

> The case of *People v. Concord Fabrics, Inc.*, 83 Misc. 2d 120, aff'd 50 A.D.2d 787, relied upon heavily by plaintiffs, is inapposite, inasmuch as it involved a proceeding brought not by individuals but by the attorney-general for injunctive relief.

Petitioners' Martin Act claim fully deserved the short shrift it received in the courts below. To include it in a petition for certiorari is an imposition upon this Court.

4. Damages Should be Awarded Against Petitioners Under Rule 49.2 for Filing a Frivolous Petition

The instant petition is completely devoid of merit. It asks this Court to review issues which involve state law exclusively. It seeks review, not even as to a general rule of state law, but as to the application of such a rule to a complex and probably unique set of facts, which is unlikely ever to recur. In the Questions Presented, it seeks to raise contrived and specious federal "issues" which were never raised in the courts below. It asks this Court to review the summary dismissal by the lower courts of an *Erie* claim under a New York State statute, without disclosing that the New York decisional law interpreting that statute is clearly adverse to petitioners' position. In view of the foregoing, respondents respectfully suggest that this is an appropriate case for the imposition of damages under Rule 49.2 of the Rules of this Court.

CONCLUSION

For all the reasons assigned, the petition should be denied. In addition, respondents respectfully suggest that appropriate damages should be awarded against petitioners for filing a frivolous petition, in violation of Rule 49.2.

Dated: September 21, 19841

Respectfully submitted,

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Appendix A

[Statement of Issues from Petitioners' Brief in the Second Circuit]

1

BRIEF FOR PLAINTIFFS-APPELLANTS

Preliminary Statement

Appeal from order of Hon. Kevin T. Duffy, District Judge, granting summary judgment dismissing the complaint and for review of orders denying class certification. Opinion on summary judgment in ____ F. Supp. ____, is reproduced in Appendix (386a);[3] opinions and orders denying the two motions for certification of a class action set forth respectively at 204a and 267a.

The Issues

1. Whether the complaint states a cause of action for breach of fiduciary obligation cognizable in equity, under the decision of the Supreme Court of Delaware in *Weinbergr v. UOP, Inc.*, 457 A.2d 701 (Del. 1983).

2. Whether the complaint states a cause of action under the Martin Act (N.Y. Gen. Bus. L., Section 352-c).

3. Whether the action should be certified as a class action under Rule 23 where there were no valid grounds in fact or in law for the denial.

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3 Reference to the Appendix is by "a" and page number, such as, " . . . a".

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No. 84-303

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1984

S. WILLIAM GREEN, EVELYN GREEN and CYNTHIA COLIN, as Executors of the Estate of Louis A. Green, deceased and EVELYN GREEN, individually, and as stockholders of Kirby Lumber Corporation, suing on behalf of themselves and for the benefit of said corporation and for the benefit of said corporation and for the class of all other stockholders of said corporation similarly situated,

Petitioners,

v.

SANTA FE INDUSTRIES, INC., SANTA FE NATURAL RESOURCES, INC., KIRBY LUMBER CORPORATION.

Respondents.

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' PETITION FOR CERTIORARI

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1984

S. WILLIAM GREEN, et al.,
Petitioners,

v.

SANTA FE INDUSTRIES, INC., et al.,
Respondents.

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

1. THE PETITION SEEKS TO CORRECT BLATANT VIOLATIONS OF THE ERIE DOCTRINE

The petition raises "special and important reasons" for review, involving a gross misapplication of Erie v. Tompkins in two instances.

(a). As to the Martin Act, defendants concede that a New York State Court would apply New York case law. Thus the District Court sitting in New York, finding it "un-

necessary to address" New York case law, blatantly violated Erie in dismissing plaintiffs' Martin Act claim on the sole "basis" of Weinberger, a Delaware decision.* Since the District Court's violation of Erie is so clear, defendants simply ignore and thus, concede this point.**

(b). As to the breach of fiduciary obligation claim,*** the Federal District Court engrafted a limitation onto the explicit grandfather clause set forth in Weinberger, thus nullifying the state created remedy specifically preserved for these plaintiffs.

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* It is undisputed that the Martin Act is properly invoked because of the substantial acts which occurred in New York. This is not a conflicts-of-law question.

** Reference to the District Court includes the summary affirmance of the Court of Appeals for the Second Circuit.

*** It is undisputed that Delaware law governs this breach of fiduciary obligation claim.

Such abuse of power is in direct conflict with the command of Erie as expressed by this Court in Day & Zimmerman, Inc. v. Challoner, 423 U.S. 3, 4 (1975):

> "A federal court in a diversity case is not free to engraft onto... state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the state...."*

Contra defendants (7), plaintiffs first question presents an Erie issue. A federal court cannot escape the command of Erie by purporting to apply state law, yet create its own exception to the unequivocal holding of the recent decision by the states highest court, directly on point. That is not a matter of interpretation. A federal court's mere claim that it is interpreting state law cannot shield it from an improper abuse of power in failing to apply the law "as it finds it." Harris v. Atchison T. & S.F. Ry

* Emphasis supplied throughout unless otherwise noted.

Co., 538 F.2d 682, 690 (5th Cir. 1976). It is plain that the Federal District Court did not have the power to "second guess the highest court" of Delaware nor "inject itself into the development of state substantive law." Powell v. Charles Offutt Co., 576 F. Supp. 272, 278 (E.D.Tex. 1983), aff'd, 731 F.2d 886 (5th Cir. 1984) (citing Erie).

Contra defendants, the above Erie issues have far-reaching effects. Erie "goes to the heart of the relations between the federal government and the states." Wright, Federal Courts, 3d ed. (1976) p. 255. This petition, seeking to correct the federal abuse of power in disregarding states' rights, has significance for all federal courts.

(c). Defendants misrepresent the facts (5) by asserting that plaintiffs "were in the virtually unique position of still litigating a pre-1977 merger at the time the

Weinberger decision was announced." Defendants fail to mention that shareholders other than plaintiffs, who held 2,403 shares of Kirby, have two separate actions pending involving this 1974 merger: one in the Southern District of New York and another in the Supreme Court, New York County.*

2. CONTRA DEFENDANTS, THE LOWER COURTS NULLIFIED DELAWARE'S REMEDY EXPLICITLY "PRESERVED" FOR PLAINTIFFS IN CONTRAVENTION OF ERIE V. TOMPKINS

Defendants misrepresent the holding in Weinberger, stating (5):

> "The opinion in Weinberger clearly indicated that the rule there announced is not retroactive as to

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* Loengard et al. v. Santa Fe et al., 82 Civ. 7919 (KTD). The case in New York State Supreme Court involves the Borg plaintiffs in addition to the petitioners, herein, contra defendants (5).

> persons who, like the plaintiff in that case, had relied on the Singer decision in deciding to forego appraisal."

There is absolutely nothing said or indicated in Weinberger that the grandfather clause applied only to persons "who had relied on the Singer decision." Rather, Weinberger unequivocally stated (457 A.2d 714) that the "right to challenge the element of fair value must be preserved" in:

> "(4) any case challenging a cash-out merger, the effective date of which is on or before February 1, 1983."

Notwithstanding the explicit language above, the District Court transformed category (4) by inserting the following underlined words:

> "any case instituted after the decision in Singer v. Magnavox, 380 A.2d 969 (Del. Supr. 1977) challenging a cash-out merger, the effective date of which is on or before February 1, 1983."

That significant qualification by the District Court is not simply "interpretation", contra

defendants (8-9). By nullifying the Delaware remedy for all persons who instituted such suits before Singer, the lower courts invented a "policy consideration" and revoked Delaware's explicit policy. The proper function of a federal court in a diversity case "is to ascertain what the state law is, not what it [thinks it] ought to be." Klaxon Co. v. Stenton Elec. Mfg. Co., 313 U.S. 487, 497 (1941).

To demonstrate the District Court's blind spot, it stated "plaintiffs would reap a windfall that the Delaware Supreme Court could not have intended." (A 13). Weinberger clearly provides a remedy here since the fiduciary fleeced its cestui stockholders in a self deal by paying them $150 per share where the established asset value is $456

per Kirby share.*

In addition to the quasi-appraisal remedy "preserved" under the grandfather clause, Weinberger also explicitly stated that the Chancellor may fashion "any form of equitable and monetary relief" (457 A.2d at 714) where:

> "[t]he appraisal remedy we approve may not be adequate...particularly where fraud,...self-dealing,...or gross and palpable overreaching are involved."

Thus, under Weinberger, appraisal is not the exclusive remedy in a cash-out merger; contra defendants (4-5) and the District Court (All-12).

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* Weinberger citing Sterling v. Mayflower Hotel Corp., Del. Supr., 93 A.2d 107, 110 (1952) held: "The requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts." Thus Weinberger confirms the fact that the 1952 rule of Mayflower is still the law in Delaware and has been at least since 1952.

The District Court abrogated Delaware's remedy for "fraud" and "gross and palpable overreaching." It has effectively converted a "fraud" against plaintiffs into a "windfall" for defendants, not plaintiffs. That unconscionable result is clearly not the command of Weinberger and no federal court has the power to change Delaware law.

Defendants flatly ignore pages 19-20 of plaintiffs petition; thus they have abandoned the District Court's "first" ground for refusing to apply the explicit grandfather clause, namely that plaintiffs "did not abjure an appraisal" within the language of Weinberger (A16). It is unrefuted that the District Court's conclusion is directly contrary to this Court's determination that "respondents [petitioners herein] . . . did not pursue their appraisal remedy in the Delaware Court of Chancery." 430 U.S. at 466-

467. Not pursuing an appraisal remedy is plainly equivalent to an abjural of appraisal.

3. DEFENDANTS CONCEDE THAT THE FEDERAL COURTS BELOW APPLIED THE LAW OF THE WRONG STATE, NAMELY DELAWARE, TO A CLAIM OF FRAUD UNDER NEW YORK'S MARTIN ACT, CONTRARY TO ERIE

Defendants abandon, as they must, the District Court's reason for dismissing plaintiffs' Martin Act claim, namely that it was based solely on the Delaware decision in Weinberger.*

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* The District Court simply stated (A6-A7): "Defendants now move for summary judgment on both causes of action on the basis of the recent holding in Weinberger v. UOP, Inc. Defendants argue that Weinberger is binding on all cases sub judice and, therefore, acts as a bar to the plaintiffs' action. For the following reasons, summary judgment is granted in the defendants' favor. Accordingly, it is unnecessary to address the arguments asserted under the Martin Act."

In fact, defendants agree with plaintiffs that the claim under New York's Martin Act is governed only "by the applicable New York authorities" (9), without reference to Delaware case law. Defendants, simply ignoring the Erie issue in plaintiffs' second question, concede that the answer should be in the affirmative.

Plaintiffs' claim under New York's Martin Act is for fraud. Contra defendants, the forced purchase of Kirby's minority shares, without prior notice of the merger, at a price of $150 per share where the undisputed asset value is $456 per share, constitutes a fraud.

Section 352-c 1(a) of the Martin Act explicitly prohibits "any fraud" (A21). The Court in Halle & Stieglitz v. Kolen* stated:

* Blue Sky L. Rep. (CCH) Para. 71,435 (N.Y. Sup. Ct. 1978) aff'd 71 A.D.2d 544, 418 N.Y.S.2d 552 (1st Dept. 1979).

> "The private right of action under General Business Law § 352-c is essentially a fraud action."

Shivers v. Amerco, 670 F.2d 826, at 831-832 (9th Cir. 1982) held:

> "New York's blue sky law does not parallel Rule 10b-5. N.Y. Gen. Bus. Law § 352-c prohibits fraud or misrepresentation...."

See also Bishop v. Commodity Exchange Inc., 564 F.Supp. 1557, 1565 (S.D.N.Y. 1983).

Unlike § 10(b) of the Securities Exchange Act of 1934, § 352-c of the Martin Act expressly prohibits "fraud", and is not confined to "deception" or "manipulation".

This Court in 1977 held that the Kirby freeze-out at an unconscionable price was not actionable under § 10(b) because it did not involve "deception" or "manipulation". Since "fraud" is expressly included in § 352-c, plaintiffs clearly state a Martin Act claim.

Defendants trifle with this Court in stating (9): "deception and reliance . . . are essential elements of any private damage action under the Martin Act." In People v. Barysh 95 Misc.2d 616, 620, 408 N.Y.S.2d 190, 193 (Sup. N.Y.Cty 1978), the Court stated that the Martin Act "clearly does not require several of the common law elements of fraud, namely, reliance and scienter". It is plain that in a forced sale situation, where the wrongdoers preempt plaintiffs from acting, reliance is "unnecessary". Vine v. Beneficial Finance Co., 374 F.2d 627, 635 (2d Cir. 1965).

Defendants (9-10) attempt to convert plaintiffs' "fraud" claim into one of "deception". In so doing, defendants distort the New York authorities. Shivers, supra, cited Halle & Stieglitz, supra, for the "'fraud or deception' requirement".

People v. Concord Fabrics, Inc., 83 Misc.2d 120, 371 N.Y.S.2d 550 (Sup. Ct. N.Y.Co), aff'd on opinion below, 50 A.D.2d 787 (1st Dept. 1975), involved a proposed freeze-out merger, on notice to the shareholders, with full disclosure, at an unconscionable price. It was enjoined under the Martin Act. On the facts, our case is a fortiori.*

4. PLAINTIFFS' ISSUES WERE BOTH RAISED BEFORE AND CONSIDERED BY THE COURT OF APPEALS, CONTRA DEFENDANTS (6-7)

The proper legal standard is that the issue be either raised or considered by the Court of Appeals before this Court will con-

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* Although the Court in Halle & Stieglitz, distinguished Concord Fabrics, the fact is that Halle & Stieglitz did not involve a freeze out merger transaction; there, plaintiffs accepted a tender offer which they later claimed had unfair terms and was coercive.

it. Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970). Plaintiffs satisfy this standard.

Defendants fail to point out that they themselves contended in the Court of Appeals:*

> "The District Court correctly applied Erie v. Tompkins in ascertaining how the Delaware Supreme Court would have decided the summary judgment motion."

Accordingly, the Court of Appeals had the Erie question before it.** Plaintiffs' two arguments below were the District Court's (i) creation of an exception to the unambiguous grandfather clause set forth in Weinberger; thus destroying the state remedy explicitly preserved for plaintiffs and

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* Heading of Point I of Defendants' Answering Brief, p. 15, dated March 2, 1984.

** Moreover, the District Court's decision specifically referred to "Erie v. Tompkins, 304 U.S. 64 (1938)" (A8).

(ii) erroneous application of Weinberger, a Delaware decision, to New York's Martin Act. The ground for both arguments was Erie. Defendants obviously considered that to be the issue inasmuch as they defended on that ground in the first point of their argument.

Defendants erroneously assert (6) that plaintiffs "did not argue, or even remotely suggest, that the District Court had refused to follow state law . . ." (original emphasis). In fact, the very first sentence of plaintiffs' "Point I", (p. 14) in their main brief in the Court of Appeals (dated February 10, 1984), asserted that the District Court had failed to follow state law:

> We submit that analysis of Weinberger demonstrates that the District Court misunderstood and failed to follow its holdings applicable to our case, thereby committing reversible error or law."

Moreover, with respect to New York's Martin

Act, plaintiffs argued in their main brief (p. 22) in the Court of Appeals:

> "The Court simply stated that 'it is unnecessary to address the arguments asserted under the Martin Act,' (388a) apparently because it erroneously believed that Weinberger, a Delaware decision, barred claims under New York's Martin Act. That is clear error of law."

That is precisely the same issue plaintiffs raise in their second question in this Court.

Accordingly, defendants' arguments that the issues herein were never raised below are without merit.

5. DEFENDANTS' CLAIM FOR DAMAGES UNDER RULE 49.2 IS SHAM

The petition and this brief demonstrate that the petition should be granted. Even if it is not granted, it clearly is not frivolous, where defendants fail to refute the fact that the District Court applied the law of the wrong state to plaintiffs' Martin

Act claim. Moreover, the District Court's nullification of plaintiffs' state-created remedy explicitly granted to them under Delaware law, is a plain violation of Erie v. Tompkins. Thus, this case is clearly not one of those highly unusual instances where it can be said that plaintiffs are guilty of bad faith. Accordingly, defendants' claim under Rule 49.2 should be denied.

CONCLUSION

For the reasons stated in the Petition and in this brief, The Petition for Writ of Certiorari should be granted.

Dated: October 9, 1984

Respectfully submitted,

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